IN THE MISSOURI SUPREME COURT

MARY CATHERINE LOWDERMILK, et al.,	)	
Appellants,	)	
	)	**No. SC84737**
vs.	)	
VESCOVO BUILDING AND REALTY COMPANY, INC., et al.,	)	
Respondents.	)	

On Appeal From The Twenty-First Judicial Circuit
State of Missouri

APPELLANTS' SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

While Appellants in no way concede that Respondents have accurately stated the facts, Missouri Rule of Civil Procedure Rule 84.04(f) only authorizes the Respondents to correct errors in the Appellant's statement of facts. Clearly, they have gone far beyond this. Rule 84.04(c) requires a "concise statement of the evidence most favorable to the verdict." *See Baris v. Layton*, 43 S.W.3d 390, 393 (Mo. Ct. App. 2001). Thus, this Court is obligated to disregard the portions of Respondents' Statement of Facts that cite to evidence that the jury rejected.

STANDARD OF REVIEW

This Court should review the verdict director against Gundaker as a question of law upon the record presented, and not as a matter within the trial court's discretion. With respect to the issue of damages, as set forth more fully in Point IV, there was no instructional error requiring the application of an abuse of discretion standard. The real complaint is as to the admissibility of certain evidence and to improper closing arguments. When a party fails to object, the standard for the trial and appellate courts is plain error. Mo. R. Civ. P. 78.08, 84.13(c). Plain error requires a showing of "manifest injustice." *Id.* Plain error review is rarely granted in civil cases and may not be invoked to cure the failure of a party to make proper and timely objections or to request corrective action. *See generally Guess v. Escobar*, 26 S.W.3d 235, 241 (Mo. Ct. App. 2000). Finally, a jury's verdict is not to be arbitrarily vacated. *See Miller v. Dowling*, 360 S.W.2d 345, 349 (Mo. Ct. App. 1962). With these principles in mind, the Court should reinstate the jury's verdict. There cannot be manifest injustice here because the verdict is

within the range of damages the jury could have awarded for lack of damp proofing alone. Moreover, the Vescovos conceded liability in closing arguments for other damages and Gundaker, despite their joint and several liability, made no objection to these concessions. Accordingly, the jury's verdict was arbitrarily vacated and the Court should reinstate it.

ARGUMENT

POINT I

The arguments asserted by the Gundaker Respondents' ignore the law and are internally inconsistent. All of the factors to be considered in analyzing whether the Court should allow an action for negligence *per se* in this instance support the right of Appellants to do so: the statutory language and the context in which it was enacted; Appellants' status as members of the protected class; the Legislature's failure to provide an exclusive means of enforcement within the statute; and the public policy goals of ensuring the effectiveness of the statutes.

In 1997, the Legislature enacted §§ 339.710-339.860. In 339.840, the Legislature provided insight into the purpose for the enactment by stating that the statutes "supersede the common law of agency with respect to whom the fiduciary duties of an agent are owed in a real estate transaction." *See* section 339.720 (general duties of a limited agent); section 339.730 (duties of an agent representing the seller); and section 339.740 (duties of an agent representing the buyer). Each of the provisions states that the agent shall have the "following duties and obligations" and then proceeds to list individually all of the duties and obligations of an agent. Thus, based upon the language of the statute and the Legislature's pronouncement of its purpose, it is clear that 339.710-339.860 were intended to provide a statutory recitation of the duties and obligations of a real estate agent.

In 1998, Gundaker was acting in the capacity of a seller's agent and therefore, was subject to the provisions of 339.730. This section sets forth the duties Gundaker owed to

their clients, the Vescovo Respondents, but also sets forth the duty that they owed to a "customer."[1] Pursuant to the statute, the licensee, defined as a real estate broker or salesperson in section 339.710(15), "shall disclose to a customer all adverse material facts actually known or that should have been known by the licensee." Section 339.810.3, aptly entitled "Misrepresentation of agents, liability," also states that the licensee will not be held *liable* for misrepresentations of the licensee's client "*unless the licensee knew or should have known of the misrepresentation*." (emphasis added). This is precisely what the Appellants proved at trial.

The state of the law prior to the enactment also provides some insight into legislative intent. When the Legislature enacts new statutes, it is presumed to act with knowledge of the existing law. *See State ex rel. Safety Roofing Systems, Inc. v. Crawford*, 2002 WL 31375687 (Mo. Ct. App. October 15, 2002). At the time of this enactment in 1997, common law claims for fraudulent and negligent misrepresentations, as well as those for negligent misrepresentations or omissions were part of Missouri's jurisprudence. *See Seidel v. Gordon A. Gundaker Real Estate Co.*, 904 S.W.2d 357 (Mo. Ct. App. 1995) and *Dobbins v. Kramer*, 780 S.W.2d 717 (Mo. Ct. App. 1989). Additionally, as early as 1941, the Legislature created the Missouri Real Estate Commission ("Commission") and gave it the power to file a complaint with the administrative hearing commission when the Commission believed that a licensee was

[1] Appellants address the arguments related to the definition of "customer" on p. 11-12 of this Brief.

guilty of "substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his business." Section 339.100.

If, as Gundaker repeatedly argues, the statute was "nothing more than a recognition of existing common law duties" and that any violations of the statute are to be enforced by the Commission, the statute would serve no purpose. This argument violates the most basic tenets of statutory construction:

> It is well-established, however, that the presumption is that the legislature did not intend for any part of a statute to be without meaning or effect. It is not presumed to have intended a useless act. The presumption is that it intended its act to have applicability and effect.

See Stiffelman v. Abrams, 655 S.W.2d 522, 531 (Mo. 1983) (en banc).[2] The only logical construction of these statutes is that by enacting 339.730 and 339.810, the Legislature intended to settle any question as to the standard of conduct a licensee is required to meet: If you know or have sufficient information such that you should know of adverse, material facts, you must disclose those facts to avoid liability.

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[2] This statement of the law also addresses the argument that the purpose of the statute was to provide for dual agency and the provisions related to misrepresentation have no effect because, each *part* of a statute must have meaning and effect.

Ironically, Gundaker takes the position here that these statutes are "nothing more than a recognition of existing common law duties," but claims in response to Points III and IV that the common law standard requires a showing of actual knowledge rather than the "should have known" standard. This is a tacit admission on the part of Gundaker that the statutes may have established a new standard of conduct that is different than what Gundaker believes to be the common law. In that event, this Court cannot ignore the Legislature's pronouncement as to what the standard of care must be in either a negligence *per se* action or an action for negligent omission.

The pronouncement of a "new" standard of care is compelling evidence that the Legislature intended to allow an action for negligence *per se* to redress violations of the statute. See *Bentley v. Crews*, 630 S.W.2d 99, 106 (Mo. Ct. App. 1981), *overruled on other grounds, Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. Ct. App. 1996) (codification of the common law in a statute serves as the basis for a claim of negligence *per se*.) *See also Monteer v. Prospectors Lounge, Inc.*, 821 S.W.2d 898, 900 (Mo. Ct. App. 1992) (in a negligence per se action, "[t]he legislature pronounces in statute what the conduct of a reasonable person must be, whether or not the common law would require similar conduct." This alone justifies the imposition of liability under a claim of negligence *per se*.

Even a cursory review of the statutory language reveals that Appellants are within the class of persons that these statutes were designed to protect. Gundaker half-heartedly suggests that the definition of "customer" may not include Appellants because they were represented by a buyer's agent. Not only is this faulty logic, it ignores the fact that

Gundaker failed to present any evidence at trial that Appellants entered into a brokerage relationship with a licensee. Furthermore, a comparison of the definitions of "client" (one who has entered into a brokerage relationship) and "customer" (one who has not entered into a brokerage relationship) in 339.710 makes it clear that the Legislature was simply trying to distinguish between the two parties to the transaction and had no intention of avoiding an agent's duties and obligations in the transaction because the "customer" may be represented by an agent.[3] In any event, the statutory directive set forth in 339.810 is not dependent upon the definition of customer and it imposes the same standard of care as 339.730.3.

While Gundaker did not elaborate on their claim that the injury sustained by appellants is not of the type the statute was designed to prevent, it is difficult to see the

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[3] If deemed necessary, this Court has the authority to fix grammatical errors within a statute to avoid an absurd result. *See Bank of Belton v. State Banking Bd.,* 554 S.W.2d 451, 456 (Mo. Ct. App. 1977) (citations omitted) canons of construction allow a court to make sense out of a statute even though mistakes in writing, grammar, by misnomer or misdescription, or omissions obscure an otherwise discernible legislative intent."). Changing the "a" to a "the" preceding "licensee" in the definition of "customer" would resolve the issue. Otherwise, it would be an absurd result indeed to hold that the Gundaker Respondents could withhold material adverse information from potential purchasers merely because the purchasers were represented by their own agent.

logic of this argument where the type of harm sustained by appellants is precisely the type of harm that compliance with the statute would have avoided. The purpose of mandated disclosure is to protect buyers of real estate from the economic harm caused by paying too much for property that is worth less than it is represented to be worth. This is precisely what occurred in this instance. Thus, Appellants are within the protected class and they sustained the type of harm the statute was designed to prevent.

Johnson v. Kraft Foods, Inc., 885 S.W.2d 334, 335 (Mo. 1994) (en banc), is instructive on this issue. In *Johnson*, the plaintiff attempted to assert a claim for negligence *per se* for violation of a statute prohibiting an employer from terminating an employee because that employee's wages were subject to garnishment for child support. The statutes included a provision authorizing the Director of the Division of Child Support Enforcement to bring an action to redress a violation of the statute, which included the right to obtain back pay and reinstatement for the terminated employee. Based upon the Legislature's express authorization of only one remedy, which it vested in the Director, this Court reasoned that this remedy was intended to be the *exclusive* remedy for violation of the statute. This Court concluded that the Legislature's provision of one remedy but not another indicated that the Legislature intended for the Director to have the sole right to bring an action for violation of the statute. This Court found it significant that the Director was entitled to seek reinstatement and back pay on behalf of the terminated employee thereby providing relief to the plaintiff through the Director's action, making a private action unnecessary to effectuate the purposes of the statute.

Whether this statute includes a "means of enforcement" that is deemed to be exclusive was settled by the Legislature at the time of the enactment. In 339.840, the Legislature stated that 339.710 to 339.860 "shall not be construed to limit civil actions for negligence, fraud, misrepresentation or breach of contract." There can be no other conclusion from this language than that the Legislature intended to allow civil actions for a breach of the standard of conduct. This indicates that any remedy included within the statute, if any, is not the exclusive means of enforcing the statutes.

A review of the authority given to the Commission with respect to these sections is also relevant to the inquiry. In 1941, upon the creation of the Commission, the Legislature authorized the Commission to "enforce the provisions of sections 339.010 to 339.180." *See* section 339.120. Similarly, when it added new sections to this Chapter, the Legislature expanded the authority of the Commission by authorizing it to "carry out the provisions of sections 339.600-339.610." *See* section 339.606. There is no comparable provision for 339.710-339.860. Although Gundaker argues that 339.850 provides this authority, it does not expressly do so. Even if this Court would construe 339.850 as impliedly authorizing the Commission to enact rules to administer 339.710 through 339.860, it is important to note what the Legislature did not give the Commission.

Section 339.100 sets forth the tools that the Commission is authorized to use to enforce the provisions of 339.010 to 339.180. These tools include things such as instituting investigations, subpoenas, filing complaints, etc. When the Legislature added provisions to this chapter, it authorized the Commission to conduct investigations and

specifically authorized the Commission to use the tools set forth in 339.100 for accomplishing enforcement. On the other hand, 339.710-339.860 include no similar provision. Thus, the Legislature did not give the Commission the "tools" to conduct investigations or otherwise enforce these provisions. This, coupled with the fact that the Commission already had the power to act in the event an agent was guilty of a misrepresentation prior to the enactment, is even further evidence that the Legislature did not intend for these new provisions to be enforced by the Commission.

In any event, even if this Court somehow found that the Commission had a right to enforce these provisions, any remedy given to the Commission would not inure to the benefit of the Appellants in this case. This Court has previously recognized the distinction between a statute with an exclusive means of enforcement and a statute that provides no civil remedy for its violation. *See Johnson,* 885 S.W.2d at 336 (citing *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*,672 S.W.2d 99, 110 (Mo. Ct. App. 1984) (an action for negligence per se was allowed because the statutes at issue did not provide a civil remedy to enforce the statutes). Thus, where the statute includes a mechanism for enforcement but provides no remedy to the aggrieved party, the courts will imply a private right of action to further the purposes of the statute. *See e.g., Jensen v. Feely*, 691 S.W.2d 926, 929 (Mo. Ct. App. 1985) (ordinance requiring dogs to be leashed supported negligence per se claim even where statute included criminal and civil penalties for its violation) and *King v. Morgan*, 873 S.W.2d 272, 278 (Mo. Ct. App. 1994) (statute limiting width of vehicles on highway supported claim for negligence *per se* even though statute provided for criminal penalties and regulations to enforce statute

imposed civil penalties). Similarly, the suspension of an agent's license or imposition of a penalty is inadequate to vindicate the interests of the Appellants. In such circumstances, a civil action is the only means of redressing this wrong.

Gundaker attempts to claim that Appellants did not meet the elements of their case because they did not establish a violation of the statute. See Gundaker Respondents' Brief at p. 49. This is nothing more than an attempt to reargue the facts that the jury already decided. This is also contrary to the well-settled rule that the facts are construed in a light most favorable to the jury's verdict. *See Bodimer v. Ryan's Family Steakhouses, Inc.*, 978 S.W.2d 4 (Mo. Ct. App. 1998). This argument is also an attempt to reargue Point III as to whether the law requires actual knowledge or whether liability may be imposed for failing to disclose facts that the agent should have known. While it is painfully obvious that this argument ignores the directive included within sections 339.730 and 339.810, a complete discussion of this claim is set forth in Point III.

As part of their attempt to claim that the statute cannot be enforced as written, Gundaker claims that it is internally inconsistent. This is a tortured reading of section 339.730. It also ignores the directive in section 339.810 that requires the same disclosure standard be met. These statutes impose a duty of disclosure. Section 339.730.3 provides that an agent is not required to conduct an independent inspection or to independently verify statements made by their clients. These concepts are not mutually exclusive—there is no duty to investigate but there is a duty to disclose when an agent receives information that may be material to a purchaser or that puts her or him on notice that full disclosure has not been made. As a practical matter, there is no harm in disclosure even

if there is some question as to its validity. If the agent makes the disclosure, the purchaser has the opportunity to do its own investigation to determine the validity of the information. Where the information is incorrect, it is of no consequence. Where the information is accurate, the purchaser can take this into account in determining the value of the property and whether they want to purchase the property. This is what the statute mandates.

The public policy considerations in allowing Appellants to bring an action for negligence *per se* are overwhelmingly in favor of it. Imposing liability here would accomplish the purpose of the legislation, which is to require an agent to comply with its duties of disclosure. And, as a practical matter, there is no downside to allowing this claim. Gundaker has identified no legitimate reason that this action should not be allowed other than to suggest that it would be an absurd result. To the contrary, it would be an absurd result if Appellants were not allowed to rely upon the standard of conduct mandated by the Legislature. For all of these reasons, this Court should impose liability on Gundaker for negligence *per se.*

POINT II

Gundaker claims that courts only recognize the imposition of a duty based upon a statute where the duty did not exist in common law. Substitute Gundaker Brief, p. 57. This is simply wrong. *See e.g., King,* 873 S.W.2d at 278 (plaintiff sued for both common law negligence and negligence *per se* for the same injuries). Furthermore, it demonstrates a fundamental misunderstanding of negligence *per se*. Negligence *per se* is negligence as a matter of law—it is a common law claim that simply requires a showing

of a statutory violation in place of a finding of negligence. *See Monteer,* 821 S.W.2d at 900.

Perhaps even more important, however, in response to Point III of Appellants' Substitute Brief, Gundaker asserts that the common law duty owed by an agent does not include the obligation to disclose material adverse facts that they "should have known." *See* Substitute Gundaker Brief, p. 63. Clearly, the duty set forth in the statute requires an agent to disclose material, adverse facts that it knew or should have known. If, as Gundaker proclaims, the common law duty was limited to actual knowledge, there is no question that the Court must accept the Legislature's pronouncement of a new standard of care. If Gundaker is correct that the common law remedy required a finding of "actual knowledge," the enactment of sections 339.730 and 339.810 "expanding" the duty to include information that the agent "should have known" is a statutorily enacted change to the common law that must be accepted by this Court. On the other hand, if the common law always required disclosure of facts that should have been known, not only does the statute provide Appellants with a private cause of action based upon the codification of that common law, but it also means that Appellants properly stated a claim under the common law for negligent omission.

POINT III

By filing no response to Point III, the Vescovo Respondents have conceded that there is a cause of action in Missouri for negligent omission. Likewise, Gundaker

acknowledges that Missouri recognizes a cause of action for negligent omission.[4] Instead, Gundaker argues that the common law claim for negligent omission requires actual knowledge of the fact that one failed to disclose, and that "knew or should have known" is an improper standard for imposing liability in a negligent omission case. Gundaker talks out of both sides of its mouth. In Point I, Gundaker vigorously argues that the statute did not change the common law with respect to a real estate transaction ("the legislature intended to simply restate a pre-existing common law exception to an otherwise dutyless [sic] relationship.") Gundaker Substitute Brief at 46. If Gundaker is right, then the common law standard for negligent omission of a material fact, at least in the context of a real estate transaction, is "knew or should have known," as set forth in 339.730 and 339.810. Gundaker's argument that the common law only imposes liability based upon "actual knowledge" flies in the face of the plain "knew or should have known" language in the statute, and is contrary to Gundaker's own characterization that the statute codified the common law.

Gundaker can point to no case requiring actual knowledge as an element of negligent omission. In both of the cases Gundaker cites, the claim involved fraud rather

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[4] Although Gundaker claims that "it is difficult to say that *Kesselring* is a ringing endorsement of negligent omission," they do not dispute the express statement in *Kesselring* that "[c]laims for both fraudulent omission and negligent omission can arise from the failure to disclose information." *Kesselring v. St. Louis Group, Inc.*, 74 S.W.2d.3d 809, 814 (Mo. Ct. App. 2002) (emphasis added).

than a negligent omission. And, neither holds that a finding of "actual knowledge" is required. In *Dobbins v. Kramer*, the court simply did not address the issue. 780 S.W.2d 717, 719 (Mo. Ct. App. 1989). Although the jury instruction given by the court stated that the defendants "knew" of the defect in the property, there was no indication that such language was required or that "should have known" could not have been included. In *Mobley v. Copeland*, the court found that actual knowledge of the fact omitted is not required, even in a fraud case–it is enough that one is without knowledge as to the truth or falsity of the fact. 828 S.W.2d 717, 724, n.7 (1992). In a negligent omission case, the standard has been described as whether the omission was made under circumstances in which the actor "ought to have known of its falsity." *See, e.g., Smith v. The Bank of New York*, 161 B.R. 302, 307 (Fl. Bankr. 1993) and *C&J Sapp Publ'g Co. v. Tandy Corp*., 585 So.2d 290, 291 (Fl. Ct. App. 1990). To the extent there was any doubt as to the standard, the Legislature settled it by enacting sections 339.730.3 and 339.810.

Once again, Gundaker claims that "there is no evidence presented that shows Gundaker had any knowledge concerning the lack of damp-proofing," and "[i]n fact, Gundaker made no disclosure to Appellants because Gundaker was never privy to any allegations of supposed 'defects.'" Gundaker Substitute Brief at 64, 65. These statements flatly ignore the overwhelming evidence supporting the jury's verdict--that Gundaker was sent and received a letter listing the defects and had conversations with the

Vescovo Respondents about the letter.[5] While Gundaker also argues that "[k]nowledge of a seller is not imputed to an agent, but must be shown independently," the Legislature also settled this issue in section 339.810 when it pronounced that a licensee is liable for the misrepresentations of her client if she "knew or should have known" of the misrepresentation.

Knew or should have known of the omitted fact is the standard for negligent omission in this case, and the verdict director stated a cause of action against Gundaker for negligent omission. Accordingly, the Court should reinstate the jury's finding of liability against Gundaker.

POINT IV

Respondents devote a large portion of their Briefs to the assertion that Appellants' damages should be limited to the difference in value of the home as it relates to the damp-proofing. This misses the point that $140,000 is a reasonably rational award for the failure to damp-proof alone. Respondents do not dispute that if a 20% discount factor is applied, the damages for the damp proofing alone is $141,579. Instead, the Vescovo Respondents argue that the $140,000 verdict was not founded on a "reasonably rational

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[5] Interestingly, Gundaker claims that it had no knowledge of the defects in the property and no information from which it should have known of them. Yet, Gundaker also claims that its clients, the Vescovo Respondents, denied that the defects existed. This demonstrates that Gundaker knew enough to inquire of its clients and learn that the clients supposedly denied the existence of the problem.

basis" because (1) a 20% discount factor is improper; and (2) the jury heard evidence of other defects.

Appellants presented evidence that 10% was a "minimum" percentage to discount the remaining value of the house because the buyer is assuming the risk and his "confidence has been shattered." Tr. Vol. III-V at 16-18. The Vescovo Respondents concede this." Vescovo Substitute Brief at 36. Appellants' expert testified that the percentage could be higher, given that the failure to damproof was a code violation.[6] Tr. Vol. III-V at 18. When asked whether, when arriving at value one would take into consideration a 10%-20% discount, Ms. Schiff responded, "[t]hat is how the marketplace works, yes." *Id*. at 19-20. Even the appellate court acknowledged that the evidence supported a discount factor of 10-20%. Appellate Opinion at 7. Accordingly, the jury was entitled to consider a 10-20% discount in determining the diminution in value. When a 20% discount factor is applied, the difference in value based on the misrepresentation is $141,579.

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[6] In an attempt to undermine this testimony, Gundaker hypothesizes a situation where the defect would cost $100 to repair. This analysis is flawed because the discount factor in this case was not only based upon the cost of repair, but also on the fact that this was a code violation, the City of Webster Groves would not issue an occupancy permit and the expected reaction of a buyer of a house in this price range without something as basic as damproofing.

Gundaker attempts to limit Appellants' damages to cost of repair by arguing that a discount factor should not be applied to determine value because Ms. Schiff agreed that if you fix all of the defects in the home, the value increases. Gundaker Substitute Brief, p. 72. This argument ignores well-established law that the cost to repair is not the measure of damages for a misrepresentation. *See Manning v. ABC Exterminators, Inc.*, 682 S.W.2d 3, 7-8 (Mo. Ct. App. 1984) (plaintiffs failed to make submissible case where only introduced evidence of cost to repair). Furthermore, Appellants' expert provided the only evidence that the jury heard on difference in value. Gundaker offered no alternative measure.

Gundaker's claim that the damage measure should actually be the measure applied to negligence actions fails for two important reasons. None of the cases relied upon by Gundaker are misrepresentation cases. *See Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322 (Mo. Ct. App. 1998) Second, Gundaker's proposed instruction at trial was modeled after MAI 4.03. Gundaker cannot now claim that the instruction should have been different. *See* Mo. R. Civ. P. 70.03.

While the Vescovo Respondents concede that diminution in value is the appropriate measure, they claim that Appellants did not make a submissible case because Ms. Schiff did not testify as to the difference in value based on the damp proofing alone. This argument is without merit. First, Appellants never argued that they should only receive cost of repair--Ms. Schiff's testimony was clear that cost of repair was a consideration, but that the 10-20% discount must be applied to determine value. Second, all of the evidence related to repairs and their cost that Ms. Schiff relied upon were

itemized. Ms. Schiff provided the jury with a formula for determining value. Thus, the jury easily calculated the difference in value for the damp proofing alone based on the itemized cost to repair list and a 20% discount factor.

Respondents claim that the jury instructions erroneously allowed the jury to award more damages than Appellants were entitled to recover. Their logic is fundamentally flawed. First, Respondents conceded that MAI 4.03 was the correct measure of damages in a misrepresentation case.[7] Vescovo Substitute Brief at 34; Gundaker Substitute Brief at 23. The Respondents claim that 4.03 should have been modified. Admittedly, there are times when an MAI requires modification. Rule 70.02(b). However, it must fairly submit damages and "any deviation from or unnecessary modification of the applicable MAI is 'presumptively prejudicial.'" *See Dubinsky v. U.S. Elevator Corp.*, 22 S.W.3d 747, 753 (Mo. Ct. App. 2000). In this case, the modification proposed by Respondents simply would not have submitted the measure of damages. Gundaker's proposed modification would have substituted "as represented" for the phrase "had the failure to waterproof been disclosed by defendants." This modification would not have avoided the alleged problem because it did not tell the jury to disregard evidence of other defects in awarding damages. But, even more important, a modification of MAI 4.03 is not the remedy for Respondents' complaint.

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[7] Although Gundaker appears to now be arguing for the first time that the instruction should have limited Appellants' recovery to the cost of repair, this argument was not made at trial and no alternate instruction was offered by them.

If no evidence of other defects or code violations were presented to the jury other than the damproofing issue, the Respondents would have no claim that 4.03 should have been modified because it awards Appellants the difference in value based on the representation submitted in the verdict director. Although Respondents disguise their complaint as an alleged jury instruction error, Respondents' real complaint is that the evidence of other defects in the case should not have been considered by the jury and that Appellants' closing argument about these defects confused the jury and led them to give more damages than the instructions authorized. In fact, the Vescovo Respondents conceded this very point in their post-trial motion when they admitted the jury instructions were correct, but the jury "was obviously confused as to the measure of damages based on the arguments of Plaintiff's counsel related to the same." Legal File 407. Where Respondents complain about something other than a jury instruction error, they had an obligation to take action other than proposing a modified instruction at trial.

At the beginning of the case, the trial judge read the general directions to the jury set forth in MAI 2.01, which authorized the jury to consider all of the evidence before it. There is no dispute that the evidence was properly received in evidence based upon Appellants' other claims in the case. Where evidence is admissible for one purpose but not for another, a party cannot be heard to complain on appeal unless it requests an instruction to limit the extent and purpose for which the jury may consider the evidence or makes a motion to withdraw the evidence from the jury's consideration. *See Lane v. Amsted Indus., Inc.*, 779 S.W.2d 754, 769 (Mo. Ct. App. 1989). Respondents could also have asked for a limiting instruction. *Barnett v. La Societe Anonyme Turbomeca France*,

963 S.W.2d 639, 655 (Mo. Ct. App. 1997) (if evidence is admissible for one count, but not for another, incumbent upon defendant to request a limiting instruction if defendant wishes to emphasize the limited purpose of the evidence). To cure the alleged problem, therefore, Respondents needed to seek a limiting instruction or move to withdraw the evidence. Neither Respondent offered a limiting instruction or requested that the trial judge withdraw the other evidence from the jury's consideration. They now complain because the jury did what the trial court instructed them to do—consider all of the evidence.

Furthermore, Respondents had a duty to object to errors in closing argument. Missouri law is well-settled that "when no objection is made to improper arguments, there is nothing for review on appeal." *See Krenski v. Aubuchon*, 841 S.W.2d 721, 728 (Mo. Ct. App. 1992), *overruled on other grounds, Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. Ct. App. 1996). Although Gundaker made a running objection at the beginning of the trial as to admissibility of evidence of other defects, which was properly overruled because the evidence came in for Appellants' other claims, that does not excuse Gundaker from objecting during closing argument. Moreover, as set forth more fully in Point V, not only did the Vescovo Respondents not object, but they embrace the concept of damages for defects other than damproofing by conceding liability for those defects. Thus, Respondents are not entitled to the relief they seek because they failed to take the required steps to preserve the alleged errors at trial.

Even assuming some modification would have been appropriate, the Respondents must show "substantial prejudice." *Barnett*, 963 S.W.2d at 652 (appellate court will not

reverse jury award for instructional error without "substantial indication of prejudice"). Otherwise, the jury's award must stand. *Id*. There simply is no prejudice here, let alone substantial prejudice – at a minimum, Appellants were entitled to $141,579 based on the evidence of difference in value for damp-proofing alone. The jury's award was both based on a reasonably rational basis and the Respondents have not been substantially prejudiced by the award.[8]

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[8] If the Court finds that the instruction should have been modified, and that the jury's award of $140,000 is disproportionate to the proof of injury, it may remit the award down to $89,276 (the difference in value for the damp-proofing conceded by the Vescovo Respondents at page 37 of their brief) or $81,020 (the amount conceded by the Gundaker Respondents). In addition, under Mo. Rev Stat. Section 537.068, the "Court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." This statute "was designed to craft equitable compensation and to eliminate, if possible, the retrial of lawsuits." *Alcorn v. Union Pacific Railroad Co. and Nat'l Railroad Passenger Corp*., 50 S.W. 3d 226, 249 (Mo. 2001).

POINT V

The Respondents' lack of prejudice by the $140,000 award is further buttressed by the concessions of Respondents during closing argument. The Vescovo Respondents argue that they (1) objected to the admission of evidence of other defects, and (2) objected to Appellants' statements in closing argument about other defects. Vescovo Substitute Brief at 49. The Vescovo Respondents do not cite to the transcript for these alleged objections. That is because they are not there. Appellants urge the court to review the transcript at pages Tr. 9/20/00 at 42-96 (testimony concerning evidence of other defects) and Tr. Vol. III-V at 594-638 concerning objections. The Gundaker Respondents objection to the admission of evidence of other defects, and appellants consented to a running objection. Tr. 9/20/00 at 83. The Vescovo Respondents, on the other hand, never objected to the admission of this evidence. The only objection made by Vescovo counsel was that Mr. Foreman's report with a reduction in costs to repair was not produced during discovery. Tr. 9/20/00 at 82. The Vescovo Respondents did not object to the admission of other defects, and, in fact, on direct examination, Robert Vescovo testified as to what he believed it would cost to repair code violations and all of the other items that needed repair. Tr. III-V at 357-438. Thus, the Vescovos themselves presented evidence to the jury concerning all of the defects in the house, not just the damp proofing.

None of the Respondents objected during closing to Appellants' counsel's argument about other defects. There were only two objections to Appellants' closing, and both were made by counsel for Vescovo. The Vescovos objected, first, that counsel

should not be permitted to refer to the evidence that the Vescovos told appellant that the house was "well-constructed" (Tr. III-V at 605) and, second, that appellants' counsel should not be permitted to say that habitat for humanity houses are built with Tyvek wrapping (Tr. III-V at 634). Gundaker made no objections to either Appellants' and Vescovos' closing argument. Tr. III-V at 594-638. Accordingly, the record is clear that the Vescovo Respondents did not object to the admissibility of evidence of other defects, and no one objected to remarks concerning other defects during closing arguments.

The Vescovo Respondents do not dispute the words of their counsel in closing, which told the jury to award damages in an amount above those for just damp-proofing. They argue instead that the jury must "follow the court's instructions, even if it requires the jury to ignore specific argument of counsel in conflict." Vescovo Respondents cite *Rains v. Herrell*, 950 S.W.2d 585 (Mo. App. 1997). *Rains* is inapposite. In *Rains*, counsel for defendant made "disparaging and inflammatory remarks in closing arguments about plaintiff's counsel and plaintiff's doctor." *Id*. at 592. Plaintiff argued that the remarks improperly appealed to the bias, prejudice and passion of the jury, and that the court erred in not granting a new trial on this basis. *Id*. Appellants are not arguing that they should receive a new trial due to any remarks by the Vescovos during closing. Quite the contrary – Appellant simply ask that the Vescovos be held to their admissions made in open court, *see, e.g.*, *Rogers v. Thompson*, 265 S.W. 2d 282, 287 (Mo. banc 1954), and ask that Court reinstate the jury's verdict. After finding that plaintiff failed to object during closing and thus waived the right to complain about the statements in post-trial

motions and on appeal, the court also found that rarely do statements of counsel rise to the level of "plain error," and did not in that case. *See Rains,* 950 S.W.2d at 593.

Gundaker's response to Point V focuses on a manifest injustice argument. Gundaker argues that the Court has the power to correct "manifest injustice," and should do so here because, "even if Gundaker could be held liable for Vescovo's alleged concessions, the cost to repair was far less than the jury award." Gundaker Substitute Brief at 76. First, as noted by the court in *Rains*, "[b]y alleging manifest injustice and miscarriage of justice, [appellant] tacitly recognizes he failed to preserve the allegation of error for review in [the appellate] court." *Rains*, 950 S.W. 2d at 592. Like the plaintiff in *Rains*, the Gundaker Respondents failed to object to closing arguments. It was incumbent upon them to object during closing. A running objection to admissibility at the beginning of trial does not suffice. Second, that the jury's award was more than cost to repair the damp-proofing does not rise to the level of manifest injustice here. Cost to repair is not the proper measure of damages -- the jury must award the difference in value. *See Manning v. ABC Exterminators, Inc.*, 682 S.W.2d 3, 7-8 (Mo. Ct. App. 1984). Accordingly, because Gundaker did not object and because there is no manifest injustice, given that the damages for damp proofing alone was $141,579, Gundaker's argument must fail.

The jury's award of $140,000 is supported by a reasonably rational basis, is not substantially prejudicial to the Respondents, is not a manifest injustice and should be reinstated.

POINT VI

The Vescovo Respondents claim that this Court lacks jurisdiction because Appellants' Points IV and V alter the basis of claims raised at the appellate court. These arguments are without merit. Appellants have not altered the basis of their claims. Points IV and V of Appellants' Substitute Brief directly correlate to Points III and IV in their Appellate Brief.

Furthermore, Mo. R. Civ. P. 83.08 provides that the substitute brief "shall include all claims the party desires this Court to review…" Accordingly, although the Court may grant transfer of a case based on only one issue, the parties are entitled to include all claims they wish the Court to review, not just those upon which it sought transfer. Point VI of the Vescovo Respondents' Substitute Brief should be denied.

POINT VII

The Vescovo Respondents improperly present this Court with evidence outside the record in an attempt to claim that the Court should dismiss the case for mootness. Evidence that is not offered at trial is not properly part of the record on appeal. *See Sydnor v. Director of Revenue*, 876 S.W.2d 627, 629 (Mo. Ct. App. 1994). In fact, as far as the Court is concerned, this evidence does not exist. *Id*. The appellate court properly rejected this argument and granted Appellants' Motion to Strike Supplemental Legal File. Appellate Opinion at 19, fn. 7.

A cause of action is only rendered moot where an "event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible." *See State ex rel. Wilson v. Murray*, 955 S.W.2d 811, 812-13 (Mo. Ct. App. 1997). The

sale of this house in August of 2001 has no impact on the ability of this Court to grant the requested relief. The cases relied upon by the Vescovo Respondents concern equitable relief that could no longer be afforded the petitioner as a result of some change in circumstance. *See e.g., Bratton v. Mitchell,* 979 S.W.2d 232 (Mo. Ct. App. 1998) (prisoner sought declaratory relief) and *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 472 (Mo. 2001) (en banc) (petition sought quo warranto ouster of prosecuting attorney). Here, appellants sued for damages, not equitable relief. The sale of the house in no way makes the Court's decision unnecessary.

Furthermore, to argue that sale of the house for greater than the amount paid by the Appellants more than three years ago necessarily indicates that the Appellants made a profit on the sale is nothing short of ridiculous. This argument does not consider the thousands of dollars spent by Appellants to bring this house up to code and to correct the existing defects in the house so that it could be sold; it does not consider the improvements made to the property by the Appellants; and it fails to take into account any changes in the real estate market that may have affected the price of the real estate. None of these things relieves the Vescovo Respondents of liability for the damages resulting to the Appellants.

CONCLUSION

For the reasons stated above, the Court should reinstate the jury's verdict in favor of Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent **via hand delivery**, along with the disk, postage prepaid, on this ____ day of November, 2002, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 7,747 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

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